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**CIMB Bank Bhd (formerly known as Bumiputera Commerce
Bank Bhd) v Sebang Gemilang Sdn Bhd & Anor**

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02 (F)-2-01 OF
2015 (C)
AHMAD MAAROP CJ (MALAYA), HASAN LAH, ABU SAMAH
NORDIN, ZAHARAH IBRAHIM AND BALIA YUSOF FCJJ
C 8 FEBRUARY 2018

D *Banking — Securities for advances — Loan — Loan facilities granted by bank
to customer to finance construction project — Sinking fund — Progress payment
received by second defendant to be deducted into fixed deposit under lien to bank
— Customer executed deed of assignment and power of attorney to first respondent
to complete construction project — Bank closed sinking fund and credited fixed
deposit monies to customer's account upon completion of project — Whether there
was effective assignment in favour of first respondent — Whether deed of
assignment made reference to sinking fund — Whether bank had knowledge of
assignment*

E The second respondent was the appellant's customer and the appellant
part-financed three government projects awarded to the respondent. As an
additional security for the financing, a sinking fund was created where 5% of
F the proceeds of the government contracts were deposited into the sinking fund
account. The account was operated solely by the appellant. The second
respondent was unable to complete the said three projects and proceeded to
execute a deed of assignment ('DOA') and a power of attorney ('POA') in
favour of the first respondent. This enabled the first respondent to complete the
G projects. The second respondent later made an application to the appellant to
add one Amiruddin Ahmad ('Amiruddin'), a director of the first respondent, as
another signatory to its current account with the appellant. The second
respondent then passes a board resolution to approve a change in the
authorised signatures in respect of its current account. The first respondent
H completed the projects. Upon the second respondent's request, the appellant
closed the sinking fund account and credited the fixed deposit to the second
respondent's current account upon repayment of the loan. The second
respondent passed another resolution to remove Amiruddin as the signatory to
its current account. After the expiry of the defects liability period, the first
I respondent approached the appellant for the release of the monies accumulated
in the sinking fund. The first respondent then discovered that the sinking fund
account had been closed and the monies had been paid out to Mohd Hamidi,
a signatory of the account and owner of the second respondent. The first
respondent sued the appellant and the second respondent at the High Court.

The High Court held that: (a) pursuant to the DOA and POA, the first respondent had a right to the monies in the sinking fund when the projects were completed and the defects liability period was over. When the appellant released the monies in the sinking fund to Hamidi without informing the first respondent, the appellant had breached its fiduciary duty as a trustee of the monies and was also negligent in doing so; and (b) the appellant owed a duty of care towards the first respondent. The High Court's decision was affirmed by the Court of Appeal. Hence the present appeal. The issues that arose were: (i) where there is no written notice of an absolute assignment pursuant to s 4(3) of the Civil Law Act 1956 ('the CLA'), is the debtor liable to the assignee for the debt under the assignment; (ii) where there is no written notice of an absolute assignment pursuant of s 4(3) of the CLA, and the trial court make a finding that the debtor has knowledge of an assignment between its customer and third party, can the debtor be held liable to that third party for the debt where the debtor has made payment of the same to its customer; and (iii) where the creditor has assigned the benefit of funds in a fixed deposit account to a third party, can mere knowledge of the identity of the signatories to a current account, constitute notice of an assignment to the debtor.

Held, allowing the appeal with costs; setting aside the decisions of courts below:

- (1) A failure to give a notice in writing pursuant to s 4(3) of the CLA will not prevent an assignee from proceeding with its action on the basis that it is an equitable assignee. Based on the facts and circumstances of the instant case, there was a valid equitable assignment of the monies in the sinking fund to the first respondent (see paras 36–37).
- (2) Both the courts below concluded that the appellant had knowledge of the equitable assignment based on the facts and circumstances of the case. It is trite law that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its judicial decision or there has been no or insufficient judicial appreciation of evidence. Based on the evidence, there was no reason to disagree with the findings of the High Court and the Court of Appeal that the appellant had knowledge of the assignment of the contracts by the second respondent to the first respondent. The finding was supported by credible evidence (see paras 38 & 42).
- (3) The Court of Appeal was not correct in arriving at its decision on the issue of dishonesty based on the combined test as profounded by *Twinsectra Ltd v Yardley and others* [2002] 2 All ER 377. It requires more than knowledge of facts to make the conduct wrongful. It requires a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behavior. The appellant merely acted in accordance with the normal banker — customer

- A relationship when it closed the sinking fund and paid the monies to the second respondent. Without other evidence it could not be said that the appellant was dishonest based on the ordinary standards of reasonable and honest people, with itself knowing, based on the subjective dishonest test, that what it did was dishonest when closing the sinking fund and paid the monies to the second respondent (see para 47).
- B

[Bahasa Malaysia summary]

- Responden kedua adalah pelanggan perayu dan perayu membiayai sebahagian daripada tiga projek kerajaan yang diawardkan kepada responden. Sebagai
- C cagaran tambahan bagi biayaan, satu dana terikat dibuat di mana 5% hasil kutipan kontrak kerajaan didepositkan dalam akaun dana terikat. Akaun ini dikendalikan sepenuhnya oleh perayu. Responden kedua tidak dapat menyempurnakan ketiga-tiga projek tersebut dan terus memeterai satu surat ikatan penyerahhakan ('DOA') dan surat kuasa wakil ('POA') berpihak pada
- D responden pertama. Ini membolehkan responden pertama menyempurnakan projek-projek tersebut. Responden kedua kemudian membuat permohonan kepada perayu untuk memasukkan seorang bernama Amiruddin Ahmad ('Amiruddin'), pengarah responden pertama sebagai seorang lagi penanda tangan bagi akaun semasanya dengan perayu. Responden kedua kemudian
- E meluluskan resolusi lembaga untuk membenarkan pertukaran dalam tanda tangan yang disahkan bagi akaun semasanya. Responden pertama menyempurnakan projek-projeknya. Atas permintaan responden kedua, perayu menutup akaun dana terikat dan mengkreditkan akaun deposit pada akaun semasa responden kedua selepas pemulangan pinjaman. Responden
- F kedua meluluskan satu lagi resolusi untuk menyingkirkan Amiruddin sebagai penandatanganan akaun semasanya. Selepas luputnya tempoh liabiliti kecacatan, responden pertama bertemu dengan perayu bagi pelepasan wang-wang yang terkumpul dalam akaun dana terikat yang telah ditutup dan wang tersebut dibayar kepada seorang bernama Mohd Hamidi, penanda tangan akaun dan
- G pemilik responden kedua. Responden pertama menyaman perayu dan responden kedua di Mahkamah Tinggi. Mahkamah Tinggi memutuskan bahawa: (a) di bawah DOA dan POA, responden pertama mempunyai hak atas wang dalam dana terikat apabila projek-projek disempurnakan dan tempoh liabiliti kecacatan luput. Apabila perayu melepaskan wang dalam dana terikat
- H kepada Hamidi tanpa memaklumkan responden pertama, perayu melanggar tanggungjawab fidusiarinya sebagai pemegang amanah wang dan telah cuai dalam berbuat demikian; dan (b) perayu mempunyai tanggungjawab berhati-hati terhadap responden pertama. Keputusan Mahkamah Tinggi disahkan oleh Mahkamah Rayuan. Oleh itu rayuan ini. Isu-isu yang timbul
- I adalah: (i) apabila tiada notis bertulis bagi penyerahhakan mutlak di bawah s 4(3) Akta Undang-Undang Sivil 1956 ('AUS'), adalah penghutang bertanggung kepada pemegang serah hak bawah penyerahhakan; (ii) apabila tiada notis bertulis tentang penyerahhakan mutlak di bawah s 4(3) AUS dan mahkamah bicara membuat dapatan bahawa penghutang tahu tentang

penyerahkan antara pelanggannya dan pihak ketiga, bolehkah penghutang dianggap bertanggung pada pihak ketiga tersebut bagi hutang di mana penghutang membuat bayaran yang sama pada pelanggannya; dan (iii) apabila pemiutang menyerahkan faedah dananya dalam akaun deposit tetap pihak ketiga, bolehkah pengetahuan semata-mata tentang identiti penanda tangan akaun semasa, membentuk notis penyerahkan pada penghutang.

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Diputuskan, membenarkan rayuan dengan kos; mengetepikan keputusan mahkamah bawahan:

- (1) Kegagalan memberi notis di bawah s 4(3) AUS tidak akan menghalang penyerah hak daripada meneruskan tindakannya atas alasan ia bukan penyerah hak berekuiti. Berdasarkan fakta dan hal keadaan kes ini, terdapat penyerahkan berekuiti wang-wang dalam dana terikat kepada responden pertama (lihat perenggan 36–37).

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- (2) Kedua-dua mahkamah menyimpulkan bahawa perayu mempunyai pengetahuan tentang penyerahkan berekuiti berdasarkan fakta dan hal-hal keadaan kes. Adalah undang-undang matan bahawa mahkamah rayuan tidak akan, secara amnya, campur tangan melainkan mahkamah bicara menunjukkan ia jelas terkhilaf dalam mencapat keputusan kehakimannya atau terdapat kekurangan pertimbangan keterangan. Berdasarkan keterangan. Tiada alasan untuk tidak bersetuju dengan dapat Mahkamah Tinggi dan Mahkamah Rayuan dan perayu mempunyai pengetahuan tentang penyerahkan kontrak oleh responden kedua kepada responden pertama. Dapatan ini disokong oleh keterangan yang boleh dipercayai (lihat perenggan 38 & 42).

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- (3) Mahkamah Rayuan terkhilaf apabila mencapai keputusannya tentang isu ketidakjujuran berdasarkan ujian gabungan dalam *Twinsectra Ltd v Yardley and others* [2002] 2 All ER 377. Ini memerlukan lebih daripada sekadar pengetahuan untuk menjadikan pelakuan tersebut salah. Ia memerlukan keadaan minda yang tidak jujur iaitu kesedaran bahawa seseorang itu melampaui standard perilaku jujur. Perayu sekadar bertindak selaras dengan hubungan ahli bank-pelanggan yang normal apabila ia menutup dana terikat dan membayar wang kepada responden kedua. Tanpa apa-apa keterangan, tidak boleh dikatakan bahawa perayu tidak jujur berdasarkan standard biasa orang yang munasabah dan jujur, sedangkan ia tahu, berdasarkan ujian ketidakjujuran subjektif, apa yang dilakukannya tidak jujur apabila menutup dana terikat dan membayar wang tersebut kepada responden kedua (lihat perenggan 47).]

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Notes

For cases on loan, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3196–3209.

A Cases referred to

Ambank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don [2012] 3 MLJ 1, FC (refd)

CIMB Bank Bhd v Maybank Trustees Bhd and other appeals [2014] 3 MLJ 169; [2014] 3 CLJ 1, FC (refd)

B *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, FC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)

C *Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, Intervener)* [1996] 2 MLJ 369, FC (refd)

S Mariappan v Government of Malaysia [1983] 2 MLJ 340, FC (refd)

Twinsectra Ltd v Yardley and others [2002] 2 All ER 377, HL (refd)

UMW Industries Sdn Bhd v Ah Fook [1996] 1 MLJ 365, FC (refd)

D *Veronica Lee Ha Ling & Ors V Maxisegar Sdn Bhd* [2011] 2 MLJ 141, FC (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)

Rules of the High Court 1980 O 18 r 8

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Appeal from: Civil Appeal No C-02–2067–09 of 2013 (Court of Appeal, Putrajaya)

F *K Shanti Mogan (Hee Hui Ting with her) (Shearn Delamore & Co) for the appellant.*

R Kamalanathan (Vinod R Kamalanathan with him) (Vinod Kamalanathan & Assoc) for the first respondent.

Hasan Lah FCJ:

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INTRODUCTION

H [1] In the High Court the first respondent sued the appellant as the first defendant and the second respondent as the second defendant for breach of contract and for breach of trust and various other causes of action.

I [2] After the full trial the High Court found for the first respondent and allowed the claim and ordered an inquiry to be held to determine the amount of money that was in the sinking fund in the account of the second respondent in the appellant's bank which was due to the first respondent based on the deed of assignment and a power of attorney granted to the first respondent by the second respondent and awarded RM500,000 as general damages against the appellant and RM100,000 as general damages against the second respondent.

[3] Dissatisfied with the decision of the High Court, the appellant appealed to Court of Appeal against the whole decision, and on 28 August 2014 the Court of Appeal dismissed the appeal with costs. A

[4] On 6 January 2015 this court granted leave to the appellant to appeal against the decision of the Court of Appeal on the following questions of law: B

(a) where there is no written notice of an absolute assignment pursuant to s 4(3) of the Civil Law Act 1956, is the debtor liable to the assignee for the debt under the assignment;

(b) where there is no written notice of an absolute assignment pursuant of s 4(3) of the Civil Law Act 1956, and the trial court make a finding that the debtor has knowledge of an assignment between its customer and third party, can the debtor be held liable to that third party for the debt where the debtor has made payment of the same to its customer; and C D

(c) where the creditor has assigned the benefit of funds in a fixed deposit account to a third party, can mere knowledge of the identity of the signatories to a current account, constitute notice of an assignment to the debtor. E

BACKGROUND FACTS

[5] The second respondent was the appellant's customer since 5 April 1994. The appellant part financed three government projects awarded to the second respondent. F

[6] As an additional security for the financing, a sinking fund was created, where 5% of the proceeds of the government contracts were deposited into the sinking fund account. The account was operated solely by the appellant. G

[7] The second respondent was unable to complete the said three projects. The second respondent then executed a deed of assignment and a power of attorney, both dated 19 September 2003, in favour of the first respondent so as to enable the first respondent to complete the projects. H

[8] On 6 May 2004, the second respondent made an application to the appellant to add one Amiruddin bin Ahmad, a director of the first respondent, as another signatory to its current account with the appellant. Before that the only signatory to the said account was Mohd Hamidi bin Dato' Hj Abd Hamid, the owner of the second respondent. I

[9] On 20 May 2004, the second respondent passed a board resolution to approve a change in the authorised signatures in respect of its current account.

A [10] The first respondent completed the projects.

[11] On 11 July 2005, upon the second respondent's request, the appellant closed the sinking fund account and credited the fixed deposit to the second respondent's current account upon repayment of the loan.

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[12] On 20 December 2006, the second respondent passed another resolution to remove Amiruddin bin Ahmad as the signatory to its current account. On 22 December 2006 a copy of the resolution was given to the appellant.

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[13] After the expiry of the defects liability period, the first respondent approached the appellant for the release of the monies accumulated in the sinking fund. The first respondent then discovered that the sinking fund account had been closed and the monies had been paid out to Mohd Hamidi.

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[14] The first respondent then sued both the appellant and the second respondent and claimed for various reliefs.

E FINDINGS OF THE HIGH COURT

[15] The High Court, inter alia, held that based on the evidence, the appellant had knowledge of the deed of assignment, the power of attorney and the second respondent's resolution dated 20 May 2004 and PW1 (the first respondent's director) had personally handed over a copy of the deed of assignment and the power of attorney to DW1 (the appellant's manager). Pursuant to the two documents, the first respondent had a right to the monies in the sinking fund when the projects were completed and the defects liability period was over. When the appellant released the monies in the sinking fund to Hamidi without informing the first respondent, the appellant had breached its fiduciary duty as a trustee of the monies and was also negligent in doing so.

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[16] The High Court also held that the appellant owed a duty of care towards the first respondent who was its customer and the first respondent suffered damage as a result of the appellant's action.

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FINDINGS OF THE COURT OF APPEAL

I [17] The Court of Appeal, in affirming the High Court's decision, held as follows:

- (a) the deed of assignment was capable of constituting a valid assignment under s 4(3) of the Civil Law Act 1956 notwithstanding the requirement

of written notice was not met. It would be an equitable assignment and the assignor, the second respondent, was made a party to the proceedings;

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- (b) the appellant had knowledge of the assignment. The first respondent's witness oral testimony and the second respondent's resolution adding a signatory, Amiruddin bin Ahmad to the second respondent's current account as well as the appellant's internal office memorandum, purportedly addressed to 'Amiruddin' were sufficient to make the appellant aware of the assignment; and

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- (c) the appellant had knowledge of the assignment and therefore committed a breach of trust. The case of *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169; [2014] 3 CLJ 1 was not applicable as in that case the Federal Court found no cogent evidence to prove dishonesty on the part of CIMB.

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THE APPELLANT'S SUBMISSIONS

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[18] Under s 4(3) of the Civil Law Act 1956, one of the pre-conditions to a valid assignment is that an express notice in writing must be given to the debtor. It was the contention of learned counsel for the appellant that by reason of its banker — customer relationship with the second respondent, the appellant was obliged to pay the second respondent, the original debtor, until and unless the written notice under s 4(3) of the Civil Law Act 1956 was given.

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[19] As regards the finding of the Court of Appeal that there was an equitable assignment which was based on the decision in *Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, Intervener)* [1996] 2 MLJ 369 it was submitted that that was not the position at common law. Learned counsel submitted that the *Scotch Leasing* case did not support the proposition as suggested by the Court of Appeal that the first respondent could proceed with an action against the appellant after the appellant had paid the debt to the second respondent.

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[20] As regards the case of *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365, which was also referred to by the Court of Appeal, learned counsel for the appellant submitted that in that case there was a written notice of assignment given. The Federal Court, by way of obiter, held that the assignee may proceed with its action on the basis that it was an equitable assignee in which case the court may require the assignee to be made a party to the proceedings. However in the instant case the debt had already been paid to the assignee at the time the suit was commenced.

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[21] On the issue of knowledge of the assignment where both the courts below held that there was knowledge of the assignment on the part of the

- A appellant, learned counsel submitted that knowledge was irrelevant because without a written notice pursuant to s 4(3) of the Civil Law Act 1956, the appellant was entitled and even legally obliged to release the money to the second respondent.
- B [22] It was also submitted that the knowledge of the assignment was imputed on the appellant by the High Court from PW1's testimony, the change of signatory of the second respondent's current account with the appellant on 20 May 2004 and the appellant's memoranda dated 25 June 2003, 15 August 2003 and 19 August 2003 addressed to one Aminuddin. It was
- C contended that none of these events imputed the appellant with notice sufficient to render its release of the money in the sinking fund to the second respondent open to challenge.
- D [23] Finally, it was submitted that following the Federal Court case of *CIMB Bank Bhd*, it is insufficient for the appellant to be imputed with 'constructive knowledge' of assignment and therefore be liable to the first respondent under the assignment. Case law requires 'dishonesty' according to the test in *Twinsectra Ltd v Yardley and others* [2002] 2 All ER 377 in order for the
- E appellant to be liable for the debt under the assignment.

SUBMISSIONS OF THE FIRST RESPONDENT

- F [24] With regard to the issue of the written notice under s 4(3) of the Civil Law Act 1956 learned counsel for the first respondent submitted that the issue was not pleaded by the appellant in its defence. The issue was only raised at the Court of Appeal stage. As such the appellant cannot raise the issue before this court. In support of that learned counsel cited the cases of *Ambank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1 and *Veronica Lee Ha Ling & Ors V Maxisegar Sdn Bhd* [2011] 2 MLJ 141.
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- H [25] As regards the issue of the equitable assignment learned counsel for the first respondent submitted that based on the decision of this court in *Scotch Leasing* the Court of Appeal's decision was right. In *Scotch Leasing* it was held that the validity of an equitable assignment was not affected by any failure to comply with requirements under s 4(3) of the Civil Law Act 1956.
- I [26] On the issue of whether the appellant had knowledge of the deed of assignment and the power of attorney granted to the first respondent by the second respondent learned counsel submitted that this was a question of fact already decided by both the High Court and the Court of Appeal.
- [27] On the facts of this case it was submitted that both the High Court and

the Court of Appeal are correct in their findings that there was a breach of trust by the appellant and there arose the issue of trust because of the knowledge on the part of the appellant of the deed of assignment and the power of attorney. It was also submitted that the Court of Appeal was right in distinguishing the facts of this case from those in the *CIMB Bank Bhd* case.

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THE NON-GIVING OF THE NOTICE IN WRITING UNDER S 4(3)
OF THE CIVIL LAW ACT 1956

[28] I shall deal first with the first respondent's submission that the issue was not pleaded by the appellant in its defence. The answer to this is that under the rules of pleading, only the facts and not the law are to be pleaded unless the matter must be specifically pleaded pursuant to O 18 r 8 of the Rules of the High Court 1980.

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[29] I find that the observations made by the court in the following two cases relating to the issue whether effect should be given to a point not raised at the trial but was raised for the first time in the appellate court are relevant. In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at p 739; [1995] 3 CLJ 520 at p 534 the Court of Appeal made the following observation:

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... In my judgment, the categories of cases in which an appellate court will admit a new point are not closed. The governing principle is this: an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of that case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

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Viewed from this standpoint, the justice of a case will ordinarily lie in favour of permitting a plea of illegality to be taken for the first time on appeal because it is unjust that a party who has broken the law should succeed. Similarly, justice would, in the usual way, favour the admission of a point that goes to the jurisdiction of the trial court because neither consent nor waiver may confer jurisdiction where none exists: and it is not in the interests of justice that a judgment of a court lacking jurisdiction should be permitted to stand.

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In the present appeal, weighing all the relevant considerations on a scale, it was the unanimous decision of this court that the balance of justice favoured the respondents.

In *S Mariappan v Government of Malaysia* [1983] 2 MLJ 340, the Federal Court said:

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In *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 PC Thomson LP delivering the judgment of the court referred to The 'Tasmania' and went on to say that 'The question of whether effect should be given to a point not raised at the trial and

A which is raised for the first time in the appellate court is one for discretion and the principles on which that discretion will be exercised have been set out by Lord Watson in his judgment in *Connecticut Fire Insurance v Kavanagh* [1892] AC 473 480 as follows —

B When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But Their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.

D [30] What is more important in this case is that the parties have argued the issue before the Court of Appeal and the Court of Appeal had decided on the issue. In fact, two of the three questions of law granted by this court for this appeal are specifically on the written notice pursuant to s 4(3) of the Civil Law Act 1956.

[31] I therefore find no merit on the respondent's contention on this issue.

F [32] Section 4(3) of the Civil Law Act 1956 reads as follows:

G (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

That provision had been considered by this court in *UMW Industries Sdn Bhd* where the following observation was made at pp 370–371:

I We have considered s 4(3) of the Civil Law Act 1956 referred to by counsel for both sides. The subsection lays down conditions for effecting absolute legal assignments. It is clear that the conditions are:

- (1) that the assignment must be in writing under the hand of the assignor;
- (2) that the assignment must be absolute and not by way of charge only; and

- (3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action. A

If the assignment fulfills all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.

As to the assignment in writing, no particular form is necessary but it must be absolute, ie one that purports to pass the entire interest of the assignor in the chose in action. Thus in *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295 (CA), Jenkins LJ dealing with s 136(1) of the Law of Property Act 1925 (English) the equivalent of which in our law is s 4(3) of the Civil Law Act 1956, said: (at p 299 F–H). B

It is, no doubt, true that s 136(1) does not require any particular form of assignment, or that the notice given to the debtor should necessarily have been given by the assignee. The subsection does, however, clearly postulate that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question. C D

[33] In *UMW Industries Sdn Bhd*, the notice was given more than two years after the execution of the deed of assignment. At pp 371–372 of the judgment this court held that: E

Section 4(3) of the Civil Law Act 1956 does not, and, for that matter, there is, as we understand, no law prescribing any limit of time within which notice must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or chose in action, eg a guarantor. All that the said s 4(3) requires is that 'express notice in writing' be given. Hence, notice may be given after the death of the assignor (*Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104), or after the death of the assignee (*Bateman v Hunt* [1904] 2 KB 530 (CA)). Notice, however, must be given before the assignee takes out its writ (*Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 at pp 127–129); *but even then, failure to do so will not prevent the assignee from proceeding with its action on the basis that it is an equitable assignee in which case the court may require the assignor to be made a party to the proceedings*. In our case presently under appeal, notice was given before the action was commenced. F G

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There remains the question whether the late notice of assignment given by the assignee has in any way affected the rights of the assignee to remedies against the guarantor. Express notice in writing under the said s 4(3) is required to be given so as: (i) a legal title to the property assigned may be acquired; (ii) to establish the priority of competing assignments if any (see eg *Marchant v Morton, Down & Co* [1901] 2 KB 829); and (iii) to prevent the debtor or guarantor in our present case paying and thereby getting a good discharge for the payment from his original creditor. It must be noted that payment to the creditor will be a good satisfaction of the debt or claim, notwithstanding it may have been assigned, if the debtor or guarantor has no notice of the assignment (*Stocks v Dobson* (1853) 4 De GM & G H I

A 11; *Lord Southampton's Estate, Allen v Lord Southampton, Banfather's Claim* (1880) 16 Ch D 178). (Emphasis added.)

B [34] In the instant case the Court of Appeal held that the failure of the first respondent to give express notice pursuant to s 4(3) of the Civil Law Act 1956 did not prevent the first respondent from proceeding with its action on the basis that the first respondent was an equitable assignee and the second respondent had been made a party to the proceedings.

C [35] In *Public Finance Bhd*, the Federal Court opined at p 381 as follows:

D At common law (in the special sense now of its being distinguished from rules in equity) contractual rights, eg as to debts, were not assignable, ie transferable to another person without the consent of both parties to the contract conferring such contractual rights. Equity stepped in and has long allowed such assignment of such debts to another person who is not privy to the contract in respect of such debts, without at all the consent of the debtor: see eg *Brice v Bannister* (1878) 3 QB 569; and even without notice to the debtor, see *Kelly v Selwyn* [1905] 2 Ch 117 and *Ward v Duncombe* [1893] AC 369. Such assignments as so allowed by equity are called 'equitable assignments'.

E *The validity of such equitable assignments is not affected by any failure to comply with requirements as laid down in s 4(3) of the Civil Law Act 1956, for an assignment that so complies has been described as a statutory assignment; being so statutory for such an assignment has the sole intended effect of facilitating an assignee to sue in his own name directly, irrespective of whether the chose in action is an equitable chose in action or a legal chose in action (not, be it noted, whether an assignment is equitable or statutory). By being a statutory assignment itself, the 'statutoriness' of such an assignment, ipso facto, does not prevail over an earlier equitable assignment, and this is so even with the added factor that the assignee involved in a statutory assignment took the assignment for value without notice of an earlier equitable assignment: eg see *E Pfeiffer Weikellerei-Weinenkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150.*

H *We need to say a few words more about the great desirability of giving notice of assignment of a debt by an assignee to the debtor, even though absence of such notice does not affect the validity of the equitable assignment as between the assignor and the assignee. If notice is not given, the assignee must give credit for any payment made to the assignor by the debtor.* This rule means that, by extension, even if the assignor assigns once more the debt to another person in fraud or otherwise on the earlier assignee, and that other person gives notice to the debtor; and if the debtor pays that other person or the second assignee, then the earlier assignee must still give credit to the debtor for his payment thus, for the debtor cannot be blamed for doing lawfully in ignorance of the title of the earlier assignee who has failed to give notice of the assignment to the debtor. Notice to debtor is for the protection of the assignee himself. It is this effect of what the debtor does lawfully as described that dims the view of the true role of the nemo dat rule in the resolution of disputed claims to a same debt. The money paid to the 'second assignee' can, of course, be recovered by the earlier assignee on the nemo dat principle. (Emphasis added.)

[36] It is clear from the decisions in the two cases cited above that a failure to give a notice in writing pursuant to s 4(3) of the Civil Law Act 1956 will not prevent an assignee from proceeding with its action on the basis that it is an equitable assignee.

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[37] I agree with the Court of Appeal that based on the facts and circumstances of the instant case there was a valid equitable assignment of the monies in the sinking fund to the first respondent. The other issue for determination is whether the payment out of the monies by the appellant from the sinking fund to the second respondent was a good satisfaction of the claim of the first respondent. This issue will be dealt with later.

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WHETHER THE APPELLANT HAD KNOWLEDGE OF THE ASSIGNMENT

[38] The issue of knowledge of the equitable assignment is entirely a question of facts. Both the courts below concluded that the appellant had knowledge of the equitable assignment based on the facts and circumstances of the case. It is trite law that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its judicial decision or there has been no or insufficient judicial appreciation of evidence (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1).

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[39] The learned trial judge made a finding that the appellant was in possession of the deed of assignment, the power of attorney and the directors' resolution dated 20 May 2005. The deed of assignment and the power of attorney dated 19 September 2003 were made by the second respondent for the purpose of assigning the three projects to the first respondent. The company's resolution dated 20 May 2004 was for the purpose of adding another signatory to second respondent's account in the appellant's bank. In coming to that decision the learned trial judge accepted the evidence of PW1, the director of the first respondent and rejected the evidence of DW1, the officer of the appellant.

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[40] In affirming that finding, the Court of Appeal had this to say:

[15] We have scrutinised the evidence on record. In our view, SP1's oral evidence is sufficient to show that the first defendant was aware of the assignment. SP1 testified that he had personally delivered both the deed of assignment and the power of attorney to SD1. SD1 had informed SP1 that there was no necessity for the bank to issue an acknowledgment receipt. The learned trial judge preferred the evidence of SP1's to that of SD1. Her Ladyship found that it was improbable for SD1 to claim ignorance of the documents when SD1 was the personnel responsible for the loan facilities and all related matter since 10 June 2002.

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[16] We have no doubt that the change of signatory in 2004 was clearly based on the deed of assignment. The second defendant had instructed the first defendant by letter dated 20 May 2004 to add one Amiruddin bin Ahmad as second signatory for the current account. The first defendant's office memorandums dated 25 June 2003, 15 August 2003 and 19 August 2003 respectively were addressed to Amiruddin. All these documents and the circumstances were sufficient to refute the first defendant's allegation that the bank/first defendant was never aware of the deed of assignment. The first defendant, at all material times, had constructive knowledge that the monies in the sinking fund had been assigned to the plaintiff and the money belonged to the plaintiff.
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[41] In his submission, learned counsel for the first respondent referred to exhs P10, P11 and P12 (being the internal office memoranda of the appellant and addressed to its manager in Kuantan) which referred to the assignment of the contract in its heading, which meant that the appellant was clearly aware of the assignment of the contract.
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[42] Based on the evidence available I cannot find any reason to disagree with the findings of the High Court and the Court of Appeal that the appellant had knowledge of the assignment of the contracts by the second respondent to the first respondent. The finding was supported by credible evidence.
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WHETHER THE APPELLANT WAS LIABLE TO THE FIRST RESPONDENT
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[43] The other issue to be dealt with is the appellant's contention that based on the decision of this court in *CIMB Bank Bhd*, it is insufficient for the appellant to be held liable to the first respondent based on the imputed constructive knowledge of the assignment because case law requires 'dishonesty' on the appellant's part according to the test laid down in *Twinsectra Ltd v Yardley and others* [2002] 2 All ER 377 in order for the appellant to be liable for the debt under the assignment.
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[44] In *CIMB Bank Bhd*, the Federal Court held that CIMB Bank was not liable to Maybank Trustee as a constructive trustee even when CIMB Bank knew of the assignment of the proceeds to Maybank Trustee because CIMB Bank was not dishonest in allowing Pesaka Astana (M) Sdn Bhd, its customer, to withdraw monies from its account.
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[45] It is therefore useful to reproduce paras 146–148 of the judgment of the Federal Court in *CIMB Bank Bhd* for the purpose of this judgment.

[146] In a gist, a new test was introduced by *Twinsectra*, in that the concept of subjective dishonesty became a requirement in a breach of trust situation. Lord Hoffman at p 382 in this case opined:

I do not think that it is fairly open to Your Lordships to take this view of the law without departing from the principles laid down by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behavior. I also agree with Lord Hutton that the judge correctly applied this test and that the Court of Appeal was not entitled, on the basis of the written transcript, to make a finding of dishonesty which the judge who saw and heard Mr Leach did not.

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[147] Lord Hutton at p 384 had added:

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Thirdly, there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this 'the combined test'.

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[148] Having scrutinised the evidence, we are satisfied that what was adduced before the court was merely evidence pointing to CIMB complying with the instructions given by the banker-customer relationship. In light of the peculiar position of CIMB, and with no cogent evidence having been adduced to say otherwise, it is our view that CIMB could not be construed as being dishonest in the ordinary standards of reasonable and honest people, with itself knowing, based on the subjective dishonest test, that what it did was dishonest when transferring the monies to other accounts. This finding and conclusion therefore would be in line with the combined tests of an objective and subjective test as propounded by *Twinsectra*.

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[46] The Court of Appeal just brushed aside the issue by saying that *CIMB Bank Bhd* was decided 'in the parameters of its own set facts' and then the Court of Appeal said:

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[21] In this instant appeal, the first defendant's conscience could not be said to be clear. To begin with, the first defendant had all prior knowledge about the assignment. By closing the sinking fund account, the first defendant had deprived plaintiff of its interest and was liable for breach of trust.

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[47] With respect, I do not think that the Court of Appeal was correct in arriving at its decision on the issue of dishonesty based on the combined test as propounded by *Twinsectra*. As stated by Lord Hoffman in *Twinsectra*, it requires more than knowledge of facts to make the conduct wrongful. It requires a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behavior. The appellant merely acted in accordance with the normal banker — customer relationship when it closed the sinking fund and paid the monies to the second respondent. Without other evidence I am unable to say that the appellant was dishonest based on the

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- A ordinary standards of reasonable and honest people, with itself knowing, based on the subjective dishonest test, that what it did was dishonest when closing the sinking fund and paid the monies to the second respondent.

CONCLUSION

- B [48] For the reasons given above my answer to the first question of law posed is in the affirmative. For the second question, my answer is in the negative as it has not been shown that the payment of the monies to its customer was done dishonestly. With regard to the third question, I find it unnecessary to answer.
- C [49] In the result, the appeal is allowed with costs. The decisions of the courts below against the appellant are set aside.
- D [50] The learned Chief Judge of Malaya, and my learned sister and brother Zaharah Ibrahim and Balia Yusof Hj Wahi FCJJ have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed with costs.

- E Reported by Afiq Mohamad Noor

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